

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

MONDAY, THE 6TH NOVEMBER 2006 / 15TH KARTHIKA 1928

ST.Rev..No. 149 of 2006()

TA.488/2000 of STAT ADDL.BENCH, KOTTAYAM
.....

REVISION PETITIONER/APPELLANT/ASSESSEE

THE KELTRON CONTROLS DIVISION,
AROOR.

BY ADV. DR.K.B.MUHAMED KUTTY (SR.)
SRI.K.M.FIROZ

RESPONDENTS: REVENUE

THE STATE OF KERALA,
REP. BY THE SECRETARY TO GOVERNMENT,
TAXES DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM.

BY GOVT. PLEADER SRI. GEORGEKUTTY MATHEW.

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD
ON 06/11/2006, ALONG WITH STRV. 390 & 402/2006, THE COURT
ON THE SAME DAY PASSED THE FOLLOWING:

C.N.RAMACHANDRAN NAIR & K.M.JOSEPH, JJ.

S.T.REV. Nos. 149, 390 & 402 OF 2006

Dated this the 6th day of November, 2006.

JUDGMENT

Ramachandran Nair, J.

Petitioner is an ailing Public Sector Undertaking under the State Government. The Sales Tax Revisions are filed against the Central Sales Tax assessment confirmed by the Tribunal for the years 1994-95 and 1995-96. Common question arising from the order of the Tribunal is whether the excess price later collected by the petitioner from the purchasers on account of exchange rate fluctuation and consequent variation in customs duty paid forms part of the price and consequently liable to be assessed as sales turnover. The admitted facts are that agreed price is linked to value of imported components and there is a price escalation clause, which entitles petitioner to recover differential exchange rate and to collect the consequent customs duty payable thereon. This presupposes that price in Indian rupee was fixed depending on the prevailing exchange rate and in fact if exchange rate fluctuates in favour of the purchaser, then petitioner would have had to pay the differential amount to the purchaser. The Tribunal confirmed

the findings of the lower authorities on the ground that price escalation is part of the contract and is directly recovered by the seller from the purchaser, which is attributable to sale of the goods and nothing else. We do not find any ground to interfere with this finding of the Tribunal.

2. Counsel for the petitioner cited a decision of the Division Bench of this court reported in **Assistant Commissioner, Sales Tax v. Krishak Bharathi Co-op. Ltd.** ((1995) 99 STC 17) and that of the Gauhati High Court in **Bongaigaon Refinery & Petrochemicals Ltd. v. Commissioner of Taxes, Assam** (1996) 103 STC 132) and contended that the receipts are similar to the amount involved in these two cases. We find that in the first case, the amount involved is “consumer price support subsidy” which was reimbursed by the Central Government to Fertilizer Company to make up their loss on account of sale of fertilizer at price fixed under the price control order. In fact the specific finding in that case is that the amount is not recovered from the purchaser, but is by way of compensation paid by the Central Government for the loss sustained by the Company on account of price

fixed by the Government for that product and that too reimbursed based on clearances from the godown and not on sales. Obviously the subsidy paid by the Central Government is neither differential price nor is it paid based on sales turnover. Therefore the decision of this court does not apply to the facts of the case of the petitioner. Similarly the issue considered by the Gauhati High Court in the second decision above referred to is the payment made by the Government from the Oil Pool Account to the Refinery to make up the loss on account of price fixation of petroleum products by the Government. The amount so paid is very similar to the fertilizer subsidy paid in the other case. Therefore this decision also does not help the petitioner to get over liability and since the facts herein clearly establish that the price difference received is based on a provision in the contract of sale and it forms sales turnover assessable under the Act, there is no scope for interference.

3. An alternative question raised in S.T.Rev. 390 of 2006 pertaining to the year 1995-96 is that the turnover in respect of the sales were offered for the year 1992-1993 and was infact assessed. We

do not know whether it was a case of advance accounting of sales to show turnover for an earlier year which is usually done by many Companies or whether the sales had taken place and turnover assessed in that year and that during this year, that is 1995-96, whether petitioner has received only the price escalation on account of exchange rate and excess customs duty payable thereon. Section 19A of the KGST Act, which provides for assessment of price variation received introduced with effect from 1.4.1978 applies to CST assessments also. What is provided in Section 19A(a) is that the price variation received has to be assessed in the year in which it is received and the dealer has to file return within one month from the date of receipt of price escalation. By virtue of this provision price escalation is separately assessable in the year in which it is received and therefore it need not be clubbed with the original price received and assessed probably in an earlier year. Anyhow, if any part of the turnover including price escalation received as above was assessed in the year 1992-93, then the same cannot be assessed for the year 1995-96. This is a matter for verification by the Assessing Officer based on assessment records

which he is directed to do. Subject to correction in this regard if any required by the Assessing Officer, we confirm the assessment for both the years and confirm the assessment on price escalation.

4. The additional question arising from the order of the Tribunal for the year 1995-96 is whether the Tribunal was justified in confirming disallowance of exemption claimed under Section 5(2) of the CST Act on supply of imported goods to the purchaser, NTPC (National Thermal Power Corporation). On going through the Tribunal's order, we find that the Tribunal has confirmed disallowance for want of evidence. We do not know what prevented the petitioner from furnishing documents, copy of the contract, bill of entry etc., which would have proved the nature and character of the transaction for substantiating petitioner's claim for exemption. In the first place the purchaser also being a Government Company would have made provision for payment of tax along with the price or otherwise understanding about exemption available under Section 5(2) of the CST Act. Therefore, it was necessary for the Tribunal to have seen the contract between the parties. Secondly, the bill of entry would have

shown as to whether the purchasers themselves have cleared the goods on payment of customs duty, in which case the case of the petitioner stands established beyond any doubt. However, this does not mean that even if clearance is made by the petitioner, it would have disentitled them for exemption because sale in the course of import is a matter to be proved with documents and evidence. From a copy of the bill of entry produced by the counsel before us, on the face of it, it appears to us that the import is of a product imported under concessional rate of duty for the purchaser and this would certainly go to advance the case of the petitioner to a large extent. Anyhow, we are disabled from deciding the issue on merits because the petitioner did not produce any document before the Tribunal and they did not have any opportunity to consider the same. However, being an ailing Public Sector Undertaking under the State Government, we feel one more opportunity should be granted to the petitioner to produce the contract between the petitioner and the purchaser, which would disclose the Port of landing of goods and other matters for considering the question. Besides this, petitioner has claimed that the appropriate State for

assessment under Section 9(1) of the CST Act is the State wherefrom the movement of the goods took place. According to the petitioner the goods were imported to Port outside Kerala, which is nearer to buyer's destination and the goods infact were cleared from those Ports and delivered to the customer at their site. The specific case of the petitioner is that most of the goods were lying in Ports outside Kerala and were cleared from those Ports and delivered to the customer's site. If the imported goods are supplied to the customer as such or consigned to customer's site, where it is assembled and delivered, then ofcourse there is no justification for the assessment in Kerala. However, if the items imported were components and after clearance were brought to petitioner's factory for assembling, then the transaction covering the value of such goods also is assessable in Kerala. Since the facts are not clear from the order of the Tribunal, we feel an opportunity can be granted to the petitioner to produce the documents before the Tribunal for reconsideration in the light of the observations above.

The Sales Tax Revisions on the question of price escalation

clause are dismissed. The other issues in S.T.Rev. 390 of 2006 are remanded to the Tribunal for reconsideration as above.

(C.N.RAMACHANDRAN NAIR, JUDGE)

(K.M. JOSEPH, JUDGE)

sb

K.S.RADHAKRISHNAN & K.M.JOSEPH, JJ.

W.A. No. OF 200

JUDGMENT

Dated this the day of February, 200.